REASONS FOR GRANTING THE PETITION

I.
THE DECISION IS AT ODDS WITH DECISIONS BY OTHER CIRCUITS IN CASES SIMILARLY SITUATED

Questions of prosecutorial misconduct are handled regularly by all the appeals courts, and by and large they revolve around common concerns and standards of law.

In the instant case, the prosecutor took the novel approach of reading in open court from the dissent in *United States v. Cheek*, 498 U.S. 192 (1991), without offering any explanation to the jury that the text to which they were just introduced was in fact the opposite of the standing precedent which *Cheek* represents. The paragraph read by the prosecutor was from Justice Blackmun's dissent:

> "[I]t is incomprehensible to me how in this day, more than seventy years after the institution of our present Federal income tax system, with the passage of Income Tax Act 1913, 38 Stat. 166, any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he received from his income was not income, irrespective of a consult that says otherwise and advises the gullible to resist income tax collections." [*Cheek*, at 209.]

The prosecutor made no effort to inform the jury that this text was the private opinion of Justice Blackmun, nor the fact that it represented the exact opposite of the actual holding of this Court in *Cheek*. Only Kleinpaste, in

ineffectual redirect of himself, tried to correct this misperception. Thereby, the prosecution improperly undermined even the possibility of a legitimate defense based on *Cheek* by poisoning the jurors' minds against Kleinpaste through deliberate misperception of the very state of the law.

The Third Circuit's conclusion on this matter was that it was "ill-advised" for the prosecutor to have read the *Cheek* excerpt, but that "no reversible error" had occurred.

By comparison, consider *United States v. LaPage*, 231 F.3d 488 (9th Circuit, 2000), whose circumstances border on being identical: The prosecutor in *LaPage* knew of false testimony by his own witness; he did nothing to correct it; he even bolstered the false testimony during closing argument. The Ninth Circuit's conclusion was that, as an issue of fundamental fairness of the proceedings in the expression of the right to due process, a new trial had to be granted. That error was not harmless. In the instant case, the erroneous perceptions about *Cheek*, which would be called false testimony if given by a witness, were introduced not by such a witness but by the government's advocate himself; he similarly did nothing to correct the misperception he deliberately offered to the jury; and he bolstered these comments during closing argument. Yet the Third Circuit held that this was not "reversible error."

Significantly, the Third Circuit speaks of a lack of "reversible error," while noting explicitly that to have quoted from *Cheek* was "ill-advised." In trying to interpolate these choices of phrasing, we can conclude only that something "ill-advised" is certainly an error of some sort, but apparently harmless in the Third Circuit's view, being not reversible. This conclusion is perverse, and demands review. We will address this further in (II) and (III) below.

Another example from the Ninth Circuit is available very recently in *United States v. Weatherspoon*, F.3d, 05 CDOS 5068 (9th Circuit, 06/13/05, case number 03-10551), in which the obligations of the prosecutor are spelled out: "In that respect we stress that the ethical bar is set higher for the prosecutor than for the criminal defense lawyer -- a proposition that has been clear for at least seven decades (see *Berger v. United States*, 295 U.S. 78, 88 (1935); and see also such cases as *United States v. Modica*, 663 F.2d 1173 (2nd Cir. 1981)." *Weatherspoon*, at 4913. Similarly, and on the same page, the Ninth Circuit added, "the difference [between a private lawyer's behavior and that of the government's own prosecutor] is that a private lawyer's impropriety ... carries no implication of official governmental support." The Third Circuit appears to have disregarded this rather obvious principle which is understood in the Ninth Circuit, about the need for government's counsel to maintain itself on high ground, giving short shrift to Kleinpaste's argument on appeal that the prosecutor in the instant case had lost sight of the forest of justice for the trees of conviction.

By no means is the Ninth Circuit the only source of the Third Circuit's visible conflict in such decisions. In *United States v. Valentine*, 820 F.2d 565 (2nd Circuit, 1987), the Second Circuit reversed conviction on the basis of the prosecutor having mischaracterized grand jury testimony during trial. "The prosecutor misrepresented, at least implicitly, the substance of the testimony of several grand jury witnesses." *Valentine*, at 566. The instant case is again similarly situated, but more severely, in that the prosecutor misrepresented, at least implicitly, this Court's own opinion in *Cheek* in order to bolster a false impression in the jurors' minds that Kleinpaste's good-faith defense was an impossibility. The prosecutor knew full well that the *Cheek* dissent, in isolation, was in effect a false statement of the law, yet he proceeded regardless, and offered no

explanation himself as to that dissent's proper, contextual placement with regard to the rest of *Cheek*.

There are numerous other examples of opinion in similar cases. See *United States v. Thomas*, 943 F.Supp. 693, 699-701 (E.D.Tex. 1996); *United States v. Forlorma*, 94 F.3d 91, 94-5 (2nd Circuit, 1996) (convictions based on prosecution arguments unsupported by record-based evidence are properly reversed); *United States v. Vouella*, 124 F.3d 389, 391, 392 (2nd Circuit, 1997); *United States v. Alzate*, 47 F.3d 1103, 1107-11 (11th Circuit, 1995) (failure of prosecutor to correct representations he made to the jury which were damaging to defendant's defense was Brady violation); *United States v. Udechukwu*, 11 F.3d 1101, 1104-106 (1st Circuit, 1993) ("It is improper to imply reliance on a fact that the prosecutor knows to be untrue" and reversed because the Government failed to provide evidence); *United States v. Kojayan*, 8 F.3d 1315, 1316-325 (9th Circuit, 1993); *United States v. Young*, 17 F.3d 1201, 1202-203 (9th Circuit, 1994) (intentionally failing to correct erroneous testimony).

This state of affairs, of one Circuit standing in conflict with other Circuits, should not be allowed to continue. This case should be reviewed in order that this Court may establish, or re-assert, a consistent perspective on what a prosecutor may reasonably do, and thereby re-harmonize the Circuits on this issue.

II.
THE DECISION IS AT ODDS WITH PRECEDENT SET BY THIS COURT

This Court has itself set the standard high indeed for prosecutorial propriety. In what may be the most well-known decision on misconduct, *Berger v. United States*, 295 U.S. 78 (1935), this Court stated clearly that:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [*Berger*, at 88.]

In the instant case, rather than properly place himself to stand in service to the law, the prosecutor instead stood the law on its head, reciting exactly the wrong text to further his ends which were not, as this Court required in *Berger*, to achieve justice, but rather merely to carve another notch of conviction. The Third Circuit has disregarded the necessary principle of *Berger*, and thereby that of this

Court, in having concluded that the prosecutor's misuse of precedent was merely "ill-advised" but not reversible.

We return to this concept of "ill-advised" behavior. The Third Circuit appears to have tried to carve out an exception to *Berger*'s standard of review, requiring that no foul blows be struck, by making what appears to be an error analysis of what occurred under F.R.Crim.P. Rule 52. We are unaware of what might be termed a "standard of review for 'ill-advised' behavior," a search for cases using such phrasing having turned up nothing that, in context, is apropos to questions of prosecutorial misconduct. The Third Circuit's attempt to carve out this new exception to the prosecutors' obligations pursuant to *Berger* is unjustified, seemingly detached from a normal error analysis.

We take careful note of the fact that the Third Circuit's decision in this regard was not unanimous: Judge Stapleton's dissent in the decision observes explicitly that this behavior constituted "prejudicial error" and "[he] would reverse the judgment of the District Court and remand for a new trial." Judge Stapleton's error analysis is in step with *Berger* and at odds with the majority opinion.

This case should be reviewed in order that exactly this sort of conduct be checked and that this country's United States Attorneys, and the Circuit Courts, be put on notice, again, as to what is and is not acceptable prosecutorial behavior.

III.
THE THIRD CIRCUIT FAILED TO CALL FOR CORRECTIVE ACTION IN THE FACE OF POISONING OF THE JURORS' MINDS

The Third Circuit held that it was "ill-advised" to quote *Cheek* but that "no reversible error" occurred as a result of it. One must wonder what the Third Circuit panel thinks a jury expects from the government's central participant -- a seasoned legal professional -- during trial: Surely a jury expects to hear the law from the government's own advocate, and not private opinions that are in effect the very opposite of the law; and they will treat anything given to them by that esteemed advocate as the law.

Indeed, this Court's opinion in *Berger*, supra, is painfully plain:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. [*Berger*, at 88.]

So a jury expects to hear the law from the prosecutor, in order to understand properly where the limits of crime and defense are placed. The matter becomes very much one of prosecutorial intent: What was the purpose for which the prosecutor raised the *Cheek* dissent?

The Third Circuit failed to address this question, even

though raised squarely in briefs. Kleinpaste had already established his awareness of and dependence on *Cheek*, on direct examination. Clearly, the actual intent of the prosecutor was deliberately to confound the jury as to the value and purpose of *Cheek*.

(We digress for a moment to note that the Third Circuit's decision references its own decision in *United States v. Irizarry*, 341 F.3d 273 (3rd Circuit, 1991), to observe that review is for plain error only, when there is no objection to remarks at trial. Appendix A, opinion below, p.6. This is completely incorrect. Kleinpaste did indeed seek mistrial, motion denied, and then asked for curative instruction to the jury. The District Court never gave such instruction.)

The Third Circuit's opinion and holding on this matter sidestepped the question of prosecutorial intent, even though explicitly asked, and instead concerned itself only with an amorphous and undefined concept of being "ill-advised." The applicability of this to Kleinpaste's verdict was not a matter of whether the prosecutor's behavior was to be regarded merely well or ill; it was a matter of whether or not the jury was even capable of considering the matter sensibly after the recitation of the *Cheek* dissent by the prosecutor. "The question is not whether the defendant would more likely than not have received a different verdict ..., but whether ... he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 441.

The question becomes one of error, F.R.Crim.P. Rule 52, and the Third Circuit has disregarded the proper tests for this quality. "When prosecutorial conduct is called in question, the issue is whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly."

United States v. Simtob, 901 F.2d 799, 806 (9th Circuit, 1990) (citing *United States v. Young*, 470 U.S. 1, 11 (1985)). It is incomprehensible that the Third Circuit could have concluded that the jury's discharge of duty was not affected by the behavior of the prosecutor in quoting the *Cheek* dissent, especially in conjunction with numerous other misbehaviors which led to the prosecutor's self-admission of error in the form of his unsolicited apology during closing argument. The standard of review for misconduct in such circumstance is that the court possesses "a sure conviction that the error did not prejudice the defendant." *United States vs. Zerbach*, 47 F.3d 1252, 1256 (3rd Circuit, 1995).

It is further the case that other precedents remind us about the wide range of impermissible behavior on the part of prosecutors. For example, also during closing argument, the prosecutor suggested in blunt words that Kleinpaste should leave the country. But this is utterly out of bounds, and yet is part of the recurring theme throughout trial of how the prosecutor behaved. The impermissibility is clear: "We remind counsel for the government, however, that prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is." *United States v. Rodriquez*, 765 F.2d 1546 (11th Circuit, 1985).

The ongoing misbehavior of the prosecutor represented a problem of cumulative error which was never addressed by the trial Court, and the Third Circuit has not taken charge of this issue in its opinion. "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must

be awarded." *Berger*, at 89. The trial Court failed even to mention the misuse of the *Cheek* dissent during jury instruction, or to address such matters as the prosecutor suggesting that Kleinpaste leave the country. "A trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate." *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Circuit, 1992).

Even though the Third Circuit was placed on notice in the Petition For Panel Rehearing that the prosecutor bolstered his *Cheek* reference during closing argument, the Third Circuit chose not to review its conclusion. The Third Circuit's opinion states, "We have considered all the specified instances and conclude that only one merits discussion" [referring to the prosecutor's recitation of *Cheek* on cross-examination]. Appendix A, opinion below, p.8. But the ensuing discussion by the Third Circuit failed to address the prosecutor's bolstering of the *Cheek* issue during revisitation of it in closing argument.

The point is obvious even from the standpoint of the ABA's Model Rules of Professional Behavior regarding the conduct of lawyers, including prosecutors. ABA Model Rule 3.3 states that lawyers "shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"; and further, "Legal argument based on a *knowingly false representation of law* constitutes dishonesty toward the tribunal" (emphasis added). These are bedrock principles of proper behavior in all proceedings, and the Third Circuit has flatly disregarded them.

At the heart of this difficulty is the nature of the plain error test, F.R.Crim.P. Rule 52, on the issue of "reasonable probability." *Kyles v. Whitley*, supra. The Third Circuit's refusal to face this squarely, having given a half-nod to "ill-

advised" behavior instead of forthrightly saying "error" and clearly delineating what kind and how much error they perceived, reflects a problem seen elsewhere and in other contexts regarding reasonable probability. For example, consider current post-*Booker* sentencing conflicts over how different circuits handle these appeals, where "reasonable probability" is the third prong of the plain error test. *United States v. Olano*, 507 U.S. 725 (1993). Some circuits remand to the District Court while others find that the needed authority in such cases cannot be delegated. Because of the need for this concept of "reasonable probability" to have a clear and consistent understanding that stretches across all the circuits, this case is ripe for review in order to contribute to that understanding.

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: September 30, 2005

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APPENDIX

Appendix A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2678

UNITED STATES OF AMERICA
Appellee

v.

KARL F. KLEINPASTE
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cr-00065)
District Judge: Honorable Gary Lancaster

Argued: July 2, 2004

Before: AMBRO, ALDISERT and STAPLETON,
Circuit Judges

(Filed: March 7, 2005)

LISA B. FREELAND (Argued)
Federal Public Defender
1450 Liberty Center
1001 Liberty Avenue
Pittsburgh, PA 15222
Attorney for the Appellant

Appendix A

LAURA S. IRWIN (Argued)
Assistant United States Attorney
700 Grant Street Suite 400
Pittsburgh, PA 15219
Attorney for Appellee United States of America

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Because we write only for the parties who are familiar with the facts and proceedings below, our discussion will be limited.

I.

We conclude that Appellant Karl Kleinpaste did not sustain a violation of his Sixth Amendment rights because he knowingly, voluntarily and intelligently waived his right to counsel at his: arraignment; pretrial proceedings; bond revocation hearing; and trial. Because the issue we will decide is "whether there was a knowing and intelligent waiver, the legal conclusion as to whether the record so indicates is subject to plenary review." United States v. Peppers, 302 F. 3d 120, 127 (3d Cir. 2002) (citation omitted). The underlying facts are reviewable only for clear error. Id.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Sixth Amendment also guarantees the right of self-representation. Faretta V. Califorania, 422 U.S. 806, 814

(1975). As such, the Constitution "embodies two competing rights because exercising the right to self-representation necessarily means waiving the right to counsel." Buhl v. Cooksey, 233 F.3d 783, 789 (3d Cir. 2000).

In Peppers, we noted this tension and explained the responsibility of the district court to resolve it by: (1) determining whether the defendant is asserting his desire to proceed pro se clearly and unequivocally; (2) conducting a thorough inquiry to satisfy itself that the defendant understands "the nature of the charges, the range of possible punishments, potential defenses, technical problems that the defendant may encounter, and any other facts important to a general understanding of the risks involved;" and (3) assuring itself that the defendant is competent to stand trial. 302 F.3d at 132 (citations and quotations omitted). If, after consideration of these factors, a defendant nonetheless insists on proceeding pro se, the court "must permit him to do so." Id. at 133. In satisfying the inquiry, the court need not follow a certain script. Iowa v. Tovar, 541 U.S. 77, 124 S. Ct 1379, 1387 (2004).

A complete review of the arraignment colloquy, however, reveals that Kleinpaste repeatedly and clearly: (1) asserted his right to self-representation, making this assertion on at least five occasions; (2) waived his rights to appointed counsel; and (3) reserved his right to seek representation of his own choosing as some later point, if he so desired.

The pre-trial the testimony before the court, reviewed in its entirety, reveals that both the court and

Kleinpaste understood that he had clearly asserted his right to proceed pro se at the arraignment, that his pro se status had not changed and that the pretrial proceedings functioned as a fact-finding mission to determine whether Kleinpaste intended to obtain counsel. The court discovered that although Kleinpaste was not waiving his right to counsel, in the two full months that had passed since the arraignment he had done little to retain counsel. Kleinpaste explained that he had not yet begun the search for a lawyer as he had "been concentrating on other matters because [he had] perceived other matters that need [sic] to be dealt with more importantly." Indeed, he filed twenty motions during this time period. Both his explanation and actions indicated that Kleinpaste was continuing to appear pro se, see United States v. Stubbs, 281 F. 3d 109, 117 (3d Cir. 2002). and although he intended to search for counsel, that search was not a priority. Because Kleinpaste's status did not change from the arraignment, in which he asserted his right to appear pro se, no need existed for the court to take any step other than to require Kleinpaste to move forward on his stated intention of retaining an attorney. See Tovar, 124 S Ct. at 1387. Moreover, the court had statutory authority to amend the conditions of release, see 18 U.S.C. § 3142 (c) (B).

Kleinpaste argues that, at his bond revocation hearing, the court failed to adhere to two of the considerations outlined in Peppers: (1) he never clearly and unequivocally requested the right to proceed pro se; and (2) the court did not conduct the necessary "penetrating and and comprehensive examination" required to ensure proper waiver. Examination of the entire colloquy at this hearing, however, reveals that, in light of the facts in this case, the

court conducted a constitutionally firm inquiry. Kleinpaste unequivocally told the court: "I, I believe I understand that, but I, I would rather go about the matter myself and find it on my own." Moreover, the court appointed standby counsel to assist Kleinpaste as his discretion.

He contends that, in the colloquy at trial, he did not clearly assert his right to pro se and thus the court failed to comply with the first consideration set forth in Peppers. He then raises seven areas of alleged error with regard to the second condition articulated in Peppers, that the court must assure itself that the defendant possesses a complete understanding of the consequences. A review of the colloquy reveals no violation of the Sixth Amendment. The court ensured that Kleinpaste: (1) understood the purpose of the hearing; (2) was competent to conduct the colloquy; (3) knew that, to his detriment, he did not possess the skills of an attorney to handle his own representation; (4) understood the nature of the charges against him; (5) knew he would have to operate in conformity with the Federal Rules of Evidence and Criminal Procedure; and (6) knew the possible penalties if convicted. The court ascertained that Kleinpaste had been reading and studying the law. See Government of Virgin Islands v. Charles, 72 F.3d 401, 406-410 (3d Cir. 1995). Although the court did not inquire explicitly at the trial colloquy whether Kleinpaste believed that counsel could adequately represent him or whether he understood that proceeding pro se could impeded his defense against the charges, neither the Supreme Court nor this Court requires a script for waiver colloquies, and instead rests the analysis on the particular facts of the case. Tovar, 124 S. Ct at 1387; United States v. Thomas, 357 F.3d 357, 364 (3d Cir. 2004).

Here, Kleinpaste had informed the court that he sought a lay-person to represent him because he distrusted the judicial system, and hence the court had no need to inquire as to why Kleinpaste rejected appointment of counsel. Moreover, notwithstanding Kleinpaste's resistance, the court continued the appointment of standby counsel. Further, it is significant that the same magistrate judge conducted Kleinpaste's arraignment and bond revocation hearing and the same district judge conducted Kleinpaste's pretrial and trial colloquies, and presided at trial.

We therefore conclude that Kleinpaste knowingly, voluntarily and intelligently waived his right to counsel at his: arraignment; pretrial proceedings; bond revocation hearing; and trial, and therefore he did not sustain a violation of his Sixth Amendment right to counsel.

II.

The prosecutor's cross-examination of Kleinpaste and closing argument did not constitute prosecutorial misconduct. We review the issue of prosecutorial misconduct for an abuse of discretion. United States v. Retos, 25 F.3d 1220, 1224 (3rd Cir. 1994). When a defendant fails to object to remarks at trial, the court reviews for plain error. United States v. Irizarry, 341 F.3d 273, 306 (3d Cir. 2003)

Kleinpaste acknowledged during his opening statement that the only issue before the jury was whether he had a good faith belief that he was not required to pay

taxes, as set forth in Cheek v. United States, 498 U.S. 192 (1991). In Cheek, the Court explained that "a defendant's claim . . . that because of a misunderstanding of law, he had a good-faith belief that he was not violating any of the provision of the tax laws" is a valid defense to a charge of violating the tax laws because, if believed by a jury, it vitiates the willfulness element. 498 U.S. at 202. Kleinpaste argues that the cross-examination of him "improperly undermin[ed]" his "good faith defense" and that the prosecutor's actions amounted to misconduct so severe as to warrant reversal of his conviction. We disagree.

Here, the prosecutor asked Kleinpaste 330 questions on cross-examination, of which Kleinpaste selects eleven as evidence of the prosecutor's hostility. Kleinpaste did not object to any of these eleven questions and, therefore, this Court reviews them only for plain error. Under this standard, Kleinpaste must demonstrate that the alleged "prosecutorial misconduct [resulted in] an egregious error or manifest miscarriage of justice." Id. (quotation omitted). A conviction must be affirmed if "it is highly probable that the error did not contribute to the judgment." Government of the Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976). This requires the court to possess "a sure conviction that the error did not prejudice the defendant." United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc) (citation and internal quotation omitted).

We have considered all the specified instances and conclude that only one merits discussion. Kleinpaste contends that the prosecutor "misrepresented" the law when he read an excerpt from the dissenting opinion in Cheek

when cross-examining him. Prior to reading from Cheek, Kleinpaste acknowledged that he had cited Cheek in his own briefs and had come across it in his research "years ago." The prosecutor then asked:

> Question: I'm reading from the bottom of Page 209 to the top of the next page; you tell me if I'm reading correctly more than seventy years after the institution of our present Federal income tax system, with the passage of Income Tax Act 1913, 38 Stat 166, any taxpayer of competent mentality can assert as his defense to charges of statutory wilfullness the proposition that the wage he received from his income was not income, irrespective of a consult that says otherwise and advises the gullible to resist income tax collections."

Kleinpaste then admitted that he previously had read Cheek.

Although it was ill-advised that the prosecutor chose to read an excerpt from the dissent, neither the question nor the passage suggests that the prosecutor read the "law of the land" as Kleinpaste contends. The government maintains that the questions was aimed at informing the jury that, in a Supreme Court case that Kleinpaste had discovered early on, at least one Justice expressed sentiment that only the gullible could fall for theories of non-tax liability. Nonetheless, any possibility of misunderstanding on the jury's part was cleared up by Kleinpaste on redirect examination:

Q: [o]n the citation to Cheek versus the United States, in which it was observed – a question about how any taxpayer of competent mentality can assert a certain defense, is that the holding in the case?

A: No, it is not; it was the dissent.

Again during his closing argument, Kleinpaste, reminded the jury that the portion of Cheek read by the prosecutor was not the holding of the case. We therefore conclude that no reversible error took place in the prosecutor's questioning about Cheek.

III.

The court properly limited lay witness testimony on perceptions of Kleinpaste's sincerity in his beliefs of tax code requirements and properly instructed the jury on assessment of character evidence. Unpreserved error is reviewed only for plain error. United States v. Gordon, 290 F.3d 539, 542-543 (3d Cir. 2002).

Rule 701 of the Federal Rules of Evidence provides that lay opinion is admissible so long as it is "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." See United States v. Polishan, 336 F.3d 234, 242 (3rd Cir. 2003). Here, the opinions of lay witnesses on how sincerely Kleinpaste held his views would not have aided the jury or clarified an issue

that the jury otherwise would not have been competent to understand. See United States v. Hauert, 40 F.3d 197, 200 (7th Cir. 1994). The jury could understand, and assess, Kleinpaste's testimony on this central issue. For this reason, the court properly excluded lay opinion testimony as irrelevant. How an individual witness may have gauged the depth of Kleinpaste's conviction has no bearing on the ultimate issue before the jury; whether it found that Kleinpaste's beliefs satisfied the good faith requirement set forth in Cheek. The court therefore was well within its discretion in refusing to allow the testimony. See Ansell v. Green Acres Contracting Co., 347 F.3d 515, 525 (3d Cir. 2003).

Kleinpaste contends that the court erred when it failed to instruct the jury that evidence of "his good character alone could raise a doubt about his guilt." Kleinpaste recognizes that his lack of request for a contemporaneous objection to the instructions necessitates that this court review only for plain error. See Gordon, 290 F. 3d at 542-543. In United States v. Spangler, 838 F.2d 85 (3d Cir. 1988), this court held that "so long as an instruction . . . is given, which calls the jury's attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt, the omission of the express 'standing alone' language . . . is not a abuse of the discretion vested in the trial court to choose the wording of the character evidence charge." Id. at 87. As a matter of law, Kleinpaste was not entitled to any express language in the instruction, and this court must consider the instructions in their entirety to determine their adequacy. Id.

Here, the court informed the jury more than once to consider all of the evidence. The court required the jurors to fulfill their duty as "sole judges of the credibility of the witnesses and the weight their testimony serves" and instructed the jury to consider the "character of the testimony given." Based on the entirety of the evidence before the jury, no plain error occurred.

IV.

Appellant challenges his sentence under United v. Booker, 543 U.S. - -, 125 S. Ct. 738 (2005). Having determined that the sentencing issues appellant raises are best determined by the district court in the first instance, we will vacate the sentence and remand for re-sentencing in accordance with Booker.

We will affirm the judgment of conviction, vacate the sentence and remand to the district court for re-sentencing.

UNITED STATES OF AMERICA V. KARL F. KLEINPASTE – NO. 03-2678
STAPLETON, Circuit Judge dissenting:

I would reverse the judgment of the District Court and remand for a new trial for two reasons. First, under the teachings of *United States v. Stubbs*, 281 F.3d 109 (3rd Cir. 2002), appellant's waiver of counsel was not knowingly and intelligently made. Second, it was prejudicial error to permit the government to read to the jury for Justice Blackmun's dissenting opinion in *Cheeks v. United States*, 498 U.S. 192 (1991).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2678

UNITED STATES OF AMERICA
Appellee

v.

KARL F. KLEINPASTE
Appellant

Present: AMBRO, ALDISERT, STAPLETON
Circuit Judges.

PETITION FOR PANEL REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is DENIED.

BY THE COURT:

s/ Ruggero J. Aldisert
Circuit Judge

Dated: May 3, 2005
tyc/cc: Lisa B. Freeland, Esq. Laura S. Irwin, Esq.

Appendix C

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.